

STATE OF NEW YORK

DIVISION OF TAX APPEALS

---

In the Matter of the Petition  
of  
**MARTIN AND CATHERINE WINKLER**  
for Redetermination of a Deficiency or for Refund of New  
York State Personal Income Tax under Article 22 of the  
Tax Law for the Year 1982.

---

DETERMINATION  
DTA NO. 818487

Petitioners, Martin and Catherine Winkler, 2202 Court North Drive, Melville, New York 11747, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the year 1982.

A small claims hearing was held before James Hoefler, Presiding Officer, at the offices of the Division of Tax Appeals, 400 Oak Street, Garden City, New York on August 22, 2002 at 9:15 A.M. Petitioners appeared by Robert J. Eckhardt, CPA. The Division of Taxation appeared by Barbara G. Billet, Esq. (Bernard Miller).

Since neither party herein elected to reserve time to file a post-hearing brief, the three-month period for the issuance of this determination began as of the date the hearing was held.

***ISSUE***

Whether interest charges should be waived or abated based on a long delay on the part of the Division of Taxation in determining the amount of additional tax due for the 1982 tax year.

***FINDINGS OF FACT***

1. Petitioners herein, Martin and Catherine Winkler, filed a timely New York State Resident Income Tax Return for 1982 reporting, *inter alia*, the following distributive share of

partnership items of income, gain, loss and deduction they received from the securities brokerage partnership McMahan, Brafman, Morgan & Co. (“MBM”):

Ordinary Partnership Loss	(\$210,714.00)
Dividend Income	1,858.00
Short-term Capital Gain	61,561.00
Long-term Capital Gain	107,567.00
Net Partnership Loss	(\$39,728.00)

2. The Division of Taxation (“Division”) conducted a review of petitioners’ returns for the years 1982, 1983 and 1984 in conjunction with its audit of MBM’s partnership returns for the same three years. As the result of its audit of MBM’s partnership returns, the Division disallowed petitioners’ distributive share of MBM’s ordinary partnership loss as claimed on their 1982, 1983 and 1984 New York State personal income tax returns. The record herein contains little evidence as to the basis for the Division’s disallowance of petitioners’ distributive share of MBM’s ordinary partnership loss for the years 1982, 1983 and 1984. The Division’s field audit report simply states that “[T]he principal adjustment was Partner’s share of disallowance of loss on partnership return for audit years.”

3. On June 12, 1987, the Division issued a Notice of Deficiency to petitioner Martin Winkler asserting that \$35,797.85 of additional New York State personal income tax was due for 1982 and 1983, together with interest. A second Notice of Deficiency was issued to petitioner Martin Winkler on August 5, 1988, this one for the 1984 tax year, asserting that an additional \$13,615.29 of tax was due, plus interest.

4. On July 8, 1987, the former State Tax Commission received a timely petition from Martin and Catherine Winkler protesting the 1982 and 1983 Notice of Deficiency dated June 12, 1987. Effective September 1, 1987 the former State Tax Commission was abolished and

thereafter taxpayers who disagreed with a deficiency notice could either request a conciliation conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS") or file a petition for hearing with the Division of Tax Appeals. The petition filed by petitioners with the former State Tax Commission on July 8, 1987 was, on September 1, 1987, deemed to be a Request for Conciliation Conference and the matter was therefore assigned to the BCMS. On October 21, 1988, the BCMS received a timely Request for Conciliation Conference from Martin Winkler protesting the 1984 Notice of Deficiency dated August 5, 1988.

5. Both the petition filed with the former State Tax Commission for the 1982 and 1983 tax years (subsequently deemed a Request for Conciliation Conference) and the Request for Conciliation Conference for the 1984 tax year contained the same grounds for protest. Specifically, these documents both assert that the Division's agent could not complete his examination of MBM's partnership returns because the Internal Revenue Service ("IRS") was also auditing the returns, and the firm's books and records were not readily accessible. It is next alleged that the Division's unwritten audit policy that cases should not be outstanding for more than two years forced the agent to abruptly terminate his review before the audit could be completed. Petitioners argue that the adjustments proposed in the two notices of deficiency were arbitrary, erroneous, without factual basis and made for the sole purpose of concluding the examination.

6. Petitioners and the IRS settled their dispute concerning the proper amount of petitioners' distributive share of income, gains, losses, deductions and credits from MBM for the years 1981 (year of initial investment) through 1986 by the execution of Form 906, Closing Agreement On Final Determination Covering Specific Matters. Form 906 was signed by petitioners on October 24, 1994 and by the IRS on August 9, 1995. As applicable to the 1982

tax year and pertinent to this proceeding, the Closing Agreement On Final Determination Covering Specific Matters provided that petitioners were “not entitled to any deduction of losses or credits in connection with MBM” and were “not required to include in gross income any income or gain attributable to their [petitioners’] investment in MBM through December 31, 1992.” Petitioners did not report the results of the final Federal determination to the Division as required by Tax Law former § 659.

7. On June 16, 2000, the BCMS conducted a conciliation conference with respect to the two notices of deficiency issued by the Division for the years 1982, 1983 and 1984, which deficiencies had been timely protested by petitioners on July 8, 1987 and October 21, 1988. The record herein does not reflect what action, if any, the BCMS took on this matter over the almost 13-year period from September 1, 1987 to June 16, 2000. In its Answer to the petition the Division asserts that petitioners’ prior representative requested that the State audit be placed on hold pending the outcome of the IRS audit for the same years.

8. On February 23, 2001, the BCMS issued to petitioners a Conciliation Order wherein the tax asserted due for the years 1983 and 1984 was canceled in full. For the 1982 tax year the Conciliation Order reflected a tax due of \$5,040.22, plus interest. The revised additional tax due for 1982 was computed based on the disallowance of the \$39,728.00 net partnership loss petitioners reported on their 1982 return as received from MBM. The Division’s disallowance of the \$39,728.00 MBM net partnership loss for 1982 is consistent with the amount which was disallowed by the IRS for 1982, which adjustment was agreed upon by petitioners and the IRS pursuant to the Closing Agreement On Final Determination Covering Specific Matters.

9. On May 7, 2001, petitioners timely filed a petition with the Division of Tax Appeals contesting the BCMS Conciliation Order as it related to the 1982 tax year. In this proceeding

petitioners concede and do not contest that \$5,040.22 of tax is due for 1982; however, they object to the Division's imposition of interest charges from April 15, 1983, which amount, as of February 7, 2001, totaled \$15,639.21.

***SUMMARY OF PETITIONERS' POSITION***

10. Petitioners maintain that the Division should have completed its audit in a timely manner, thereby placing itself in a position to issue an assessment for the proper tax due in 1987. Had the Division done so, the amount of interest petitioners would have owed would have been significantly less. Petitioners argue that there was absolutely no basis in fact or law to support the Notice of Deficiency issued by the Division for 1982 and that by issuing a notice which grossly overstated the tax due they were put in defensive position which distorted their view of what might eventually happen. Petitioners point to the fact that they timely protested the Notice of Deficiency for 1982 in 1987 and that the Division failed to follow up on their protest for some 13 years. They also believe that the Division needlessly delayed this matter a second time when it waited almost five years after the IRS audit was finalized in 1995 before a Conciliation Conference was held on June 16, 2000. Petitioners assert that it is fair and equitable to waive the interest charges considering all of the above factors, plus the financial hardship imposed upon them by the Division's long delay in this matter.

***CONCLUSIONS OF LAW***

A. There are essentially two distinct events which must be addressed here: first the Division's own audit of petitioners' return for the 1982 tax year which resulted in the issuance of a Notice of Deficiency on June 12, 1987 and also the results of the IRS's audit of petitioners' return for the same year. I agree with petitioners that there is little or no evidence to support the basis upon which the Division issued the Notice of Deficiency for 1982. Had this been the only

issue brought before me, I would have concluded, based on this record, that the Division's audit for 1982 was erroneous and that the notice issued based on said audit be canceled. However, the fact that the IRS conducted a separate audit of petitioners' 1982 return, which audit was agreed to by petitioners, adds another dimension to this dispute which requires further analysis.

B. As relevant to this proceeding Tax Law former § 659 provides as follows:

[I]f the amount of a taxpayer's federal taxable income . . . reported on his federal income tax return for any taxable year . . . is changed or corrected by the United States internal revenue service . . . the taxpayer or employer shall report such change or correction in federal taxable income . . . within ninety days after the final determination of such change . . . and shall concede the accuracy of such determination or state wherein it is erroneous.

C. In the instant matter there is no dispute that petitioners did not report to the Division, as required by Tax Law former § 659, the changes made by the IRS to their taxable income as reported on their 1982 Federal income tax return. Tax Law § 683 sets forth various time periods within which the Division can issue an assessment to a taxpayer and, as pertinent herein, Tax Law § 683(c)(1) provides that "[T]he tax may be assessed at any time if . . . (C) the taxpayer or employer fails to comply with section six hundred fifty-nine in not reporting a change or correction in his federal taxable income. . . ."

D. When the Division became aware of the final results of the IRS audit of petitioners' return for 1982 it chose to modify the Notice of Deficiency it had issued on June 12, 1987 to be consistent with the IRS audit findings. By this action the Division has in essence abandoned the results proposed by its own audit and adopted the results of the IRS audit which were agreed to by petitioners and the IRS. Since petitioners did not report the final results of the IRS audit to the Division as required by Tax Law former § 659 there is no statute of limitations on assessment, and the Division could have canceled its Notice of Deficiency dated June 12, 1987

and simply issued a new assessment based on the unreported Federal audit changes. In either scenario the final result is exactly the same, i.e., that petitioners owe an additional \$5,040.22 of New York State personal income tax for the 1982 tax year based on the results of the IRS audit for said year. Thus, the facts and circumstances surrounding the Division's own audit and the Notice of Deficiency issued on June 12, 1987 based on said audit are no longer particularly relevant to the issues now in dispute in this proceeding.

E. Tax Law § 684, entitled "Interest on underpayment," provides that "[I]f any amount of income tax is not paid on or before the last date prescribed in this article for payment [in this case April 15, 1983], interest on such amount . . . shall be paid for the period from such last date to the date paid. . . ." By requesting that a portion of the interest charges be abated, petitioners, in essence seek an interest-free loan from the State of New York. As noted by the Tribunal in *Matter of Rizzo* (Tax Appeals Tribunal, May 13, 1993):

Failure to remit tax gives the taxpayer the use of funds which do not belong to him or her, and deprives the State of funds which belong to it. Interest is imposed on outstanding amounts of tax due to compensate the State for its inability to use the funds and to encourage timely remittance of tax due. . . . It is not proper to describe interest as substantial prejudice, as it is applied to all taxpayers who fail to remit . . . tax due in a timely manner. Rather, a more accurate interpretation would be to say that interest represents the cost to the taxpayer for the use of the funds. . . .

F. Petitioners argue that the Division had a responsibility and duty to complete its own audit in a timely and accurate manner and that, had it done so, the proper tax due would have been determined in 1987, thus significantly reducing the interest that would be payable. This argument fails to recognize that it is petitioners' responsibility to file an accurate tax return and pay the proper tax due in a timely manner and this they did not do. Petitioners at any time could have made an additional payment to the Division for the 1982 tax year to limit the amount of interest due; however, they chose not to avail themselves of this option.

While petitioners assert that the principles of fairness and equity weigh heavily in their favor, I do not find this to be a convincing argument. Pursuant to Tax Law former § 659 petitioners were required to report the results of the final Federal determination to the Division and they failed to do so. Petitioners cannot reasonably argue that principles of fairness and equity weigh in their favor when they failed to file an accurate return in the first instance; elected not to make a supplemental payment of tax even though both the Federal and State taxing authorities had taken the position that they did not properly report the income and losses from MBM; and, finally, failed to notify the Division of the final results of the IRS audit for 1982, notwithstanding the fact that they were required by statute to so notify the Division. Petitioners have now had the use of the State's money for a period in excess of 19 years and there is simply no basis in law or in equity to grant petitioners the relief they seek.

G. The petition of Martin and Catherine Winkler is denied and the Division's Notice of Deficiency dated June 12, 1987, as modified by the Conciliation Order dated February 23, 2001, is sustained, together with such interest as may be lawfully due and owing.

DATED: Troy, New York  
November 14, 2002

/s/ James Hoefler  
PRESIDING OFFICER